IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 71 of 1989

For Approval and Signature:

Hon'ble MR.JUSTICE R.P.DHOLAKIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

UPADHYAYA NATVERLAL SHIVRAM

Versus

STATE OF GUJARAT

Appearance:

1. Second Appeal No. 71 of 1989

MR NK MAJMUDAR for appellant Nos. 1-5/1

MR KL PANDYA, AGP for Respondent No. 1

NOTICE SERVED for Respondent No.2-None appeared

MR RM CHHAYA for Respondents Nos. 3-6

CORAM : MR.JUSTICE R.P.DHOLAKIA

Date of decision: 15/10/2001

C.A.V. JUDGEMENT

This Second Appeal by the appellants-original plaintiffs is directed against the judgment and decree

dated 13-1-1989 passed by the learned Assistant Judge, Sabarkantha at Himmatnagar in Regular Civil Appeal No.52 of 1986 whereby the learned Judge, while dismissing the appeal, confirmed the judgment and decree dated 16-9-1986 passed by the learned Civil Judge (S.D.), Sabarkantha at Himmatnagar in Regular Civil Suit No.116 of 1978 wherein the Trial Court has dismissed the suit of the plaintiffs.

2. When it has come up for admission, this Court (Coram: N.B.Patel,J. as he then was) vide order dated 27-3-1989 admitted the appeal.

3. An application being Civil Application No.11671 of 1998 has been filed by the respondent Nos.3 to 6 for joining them as party respondents. Same has been allowed vide order dated 28-1-1999 and they have been joined as party respondent Nos.3 to 6 in Second Appeal No.71 of 1989 and they are represented by learned advocate Mr.R.M.Chhaya.

4. Facts emerged from the record and proceedings are as under:

4.1 Present appellants-original plaintiffs have filed the suit on the ground that they are grazing and using the suit land for using their village cattle as a right since more than 60 years without any interruption and within the knowledge of the defendant No.1. So, the Government is not entitled to divest this land from gauchar land. Therefore, they have prayed for declaration to be issued against the defendants to the effect that the suit land has to be used by them without interruption as of right for more than 60 years as gauchar land and for a permanent injunction restraining the Government from causing obstruction and interruption to them from enjoying the use of the suit land.

4.2 Same has been objected by the respondent No.1, State of Gujarat by way of filing written statement at Ex.38. At the end of trial, learned Trial Judge has dismissed the suit of the plaintiffs and, therefore, an appeal being Civil Regular Appeal No.52 of 1986 has been preferred before the learned District Judge. However, said appeal has been dismissed by the learned Assistant Judge, Sabarkantha at Himmatnagar on 13-1-1989. It is against both the concurrent judgments and decrees of the Courts below, present Second Appeal has been preferred by the appellants.

5. I have heard Mr.N.K.Majmudar, learned advocate for the appellants, Mr.K.L.Pandya, learned A.G.P. for

the respondent No.1 and Mr.R.M.Chhaya for the respondent Nos.3 to 6. However, nobody remained present on behalf of respondent No.2, though served.

6. Scope of Sec.100 of CPC and power of the High court while exercising jurisdiction as a Second Appellate Court are by now well demarcated and settled by way of the judgment of Apex Court in the case of Ramaswamy Kalingaryar V. Mathayan Padayachi AIR 1992 Supp.(1) SCC 712. The Apex Court clearly reiterated the principle that High Court cannot upset the finding of facts recorded by the Lower Appellate Court by reasoning the evidence or reassessing the qualitative value of such evidence on record and thus, cannot reverse the finding of facts under Sec.100 of CPC. In fact, the High Court cannot interfere with such finding of facts even by examining or reappreciating the evidence from the aspect of sufficiency of proof. Keeping in mind the above aspect of the matter, I proceed further in the matter.

7. Mr.Majmudar, learned advocate for the appellants has raised the first point that Village people of Kuba, Dharol, District Sabarkantha have exercised their right of suit land without any interruption for more than 60 years and, therefore, the respondent State has no authority to take away the land in question for any other purpose.

8. Whereas Mr.K.L.Pandya, learned A.G.P. for the State has drawn my attention towards the above point arguing that it is a question of fact and both the Courts below have held against the present appellants after considering all the evidence on record. He has drawn my attention towards paras 15 and 16 of the judgment of the lower Appellate Court. Both the Courts below have discussed the same at length after considering documentary evidence namely, revenue record, as well as oral evidence of plaintiff No.2-Manek Joitaram Patel, Ex.136 and came to the conclusion that there is no evidence to show that the village people are grazing their cattle in the suit land since more than 60 years and, therefore, I am unable to accept the contention raised by the learned advocate for the appellants that the plaintiffs have proved that they were grazing their cattle on the land without any interruption for more than 60 years. Since it is admittedly a question of fact, I hold that there is no substance in the said point raised by the learned advocate or the appellants.

9. The second point raised by the learned advocate for the appellants is that Government is not entitled to

resume the suit land from the head of gauchar for other purpose. He has also argued that before doing so, if at all State is entitled to do so, they ought to have given opportunity of being heard to the affected parties. He has drawn my attention towards Secs.37 and 38 of the Bombay Land Revenue Code, 1879 and also towards Secs.96, 96(1) and 96(4) of the Gujarat Panchayat Act, 1961.

9.1 Relying upon a case reported in 35(1) G.L.R. page 375, he has argued that though the Government has got a right under Sec.96 of the Act to resume the land from the Panchayat for public purpose, it was their duty to hear the affected parties before passing the order for resuming the land. He has contended that even in administrative matters, principles of natural justice must be observed.

It has been held by the Court at head note as under:

> "Gujarat Panchayats Act, 1961 (VI of 1962)--Sec.96--Under Sec.96, Government has the right to resume lands from a Panchayat which land has been vested in the Panchayat--however, before resuming land, the Panchayat concerned must be heard--Even in administrative matters, principles of natural justice must be observed."

9.2 He has also relied upon the case reported in 1992(1) G.L.H. page 19 wherein it was held by the Court in para 5A as under:

> "If S.96(1) and (4) is properly construed along with S.98(2) it leaves no room for doubt that the vesting of land by Government in duly constituted Panchayat is nothing more than transfer of right to possession of land and even when the Panchayat is to transfer or deal with such property, previous sanction of the competent authority is required. S. 96(4) clearly provides that it shall be lawful for the State Government to resume at any time such open site or waster, vacant or grazing land which has been vested by it in Panchayat. Therefore, if the land when vested by State Government in Panchayat was grazing land, it could be resumed at any time for public purpose.

9.3 He has also relied upon another case reported in AIR 1985 (Gujarat) page 105, wherein it has been held by

this Court as under:

"It is undoubtedly a public purpose to bring part of a Gauchar land under the cultivation to augment, food, deep. It is also a pubic purpose to allot the land to a member of backward class for his personal cultivation."

10. There is no dispute regarding the principles laid down by the Court in the above reported judgments. It is clear from those judgments that vesting of land by the Government in Panchayat is nothing more than transfer of right to possession of land and when grazing the land is vested in Panchayat, same can be resumed by the Government at any time. But facts established from the record and proceedings and from the concurrent judgments are that before taking the decision under Sec.96 of the Gujarat Panchayat Act, the Collector has given opportunity to the Panchayat and Panchayat has been heard by the Collector before the order of disassignment has been passed which reflects from para 17 of the judgment of the lower Appellate Court and it is a finding of facts recorded by both the Courts below and, therefore, appellants will not be entitled to any benefit out of the above referred judgments.

11. Now the question which has been raised by the learned advocate for the appellants is that before passing the order for resuming the land, opportunity ought to have been given to the users of the land. In this connection, he has relied upon 35(1) G.L.R. page 731 wherein it has been held in para 11 as under:

"On plain reading of Sec.38 of the Code, it would appear that once the land is set apart for free pasturage of the village cattle, it shall not be used for any other purpose without the sanction of the Collector. Even when the land of this nature is to be disposed of under Sec.37 of the Code, the Collector is required to have due regard to such special assignment of land. Section 39 recognises grazing on free pasturage lands which are earmarked for such purpose under Sec.38 as a right of the concerned villagers. Admittedly, the Government have prescribed the cattle to land ratio for setting apart adequate area of land for such purpose. When the law has recognised the existence of the right of the villagers over free pasturage lands, it is obvious that any action which has the effect of

> extinguishment of such right would adversely affect the graziers who are entitled to it. It, therefore, follows that before their right is extinguished, they should be given an opportunity of having their say in the matter. Such a course is even implied in the provisions of Sec.38 of the Code, which requires the collector to have due regard to such special assignment while disposing of the land under Sec.37 of the Code. Having regard to the nature of the right, it will not be possible in such cases to give individual notices but inviting of objection against extinguishment of the right of free pasturage would be the minimum that an authority can do to protect its action from any arbitrariness that may creep in."

He has argued that villagers have right to grace their cattle at pasture lands, but they must be heard by the Collector before their rights are taken away.

12. It is to be noted that before passing the order, Collector has given opportunity to the Panchayat which reflects from the order passed by the Collector itself. Therefore, the above judgment does not help the appellants as the Collector has not violated the principles of natural justice.

13. Even if the above referred judgments are considered, it has been held there that before the right is extinguished, they should be given an opportunity of having their say in the matter. Such course is even implied in the provisions of Sec.38 of the Bombay Land Revenue Code which require the Collector to have given due regard to such special assignment while disposing of the land under Sec.37 of the Code. Even in that circumstances also, Court has held that having regard to the nature of right, it will not be possible in such cases to give individual notices, but inviting objections against extinguishment of the right of free pasturage would be the minimum that an authority can do to protect its action from any arbitrariness that may creep in.

14. Learned advocates for the respective parties have taken me to the relevant discussion of the Courts below on this point. It has been established from the record and proceedings and from the findings of both the Courts that before passing the order, opportunities were given to the Panchayat. Much reliance has been placed by the learned advocate for the appellants on 35(1) G.L.R. 731.

It was held by the Court in that reported case at the time of deciding and dealing with Secs.37 and 38 of the Bombay Land Revenue Code, 1879 (Act No.5 of 1879). Here in this case, as I have discussed earlier, as per the land revenue record, the land in question has not been set apart for grazing cattle and the land has been resumed back by the Collector under Sec.96(4) of the Gujarat Panchayat Act, 1961 and that too, after following procedure. When the Government has got right to resume the land which was vested in the Panchayat and not specifically vested for gauchar purpose, before resuming the same, opportunities were given to the Panchayat and, therefore, appellants will not get any benefit out of the judgment on which much reliance was placed by their learned advocate. I am in agreement with the view taken by the lower Appellate Court that Government has right to resume the land at any time after affording opportunity of being heard to the affected parties.

15. In view of what has been stated above, I do not find any substance in the substantial questions of law raised by the learned advocate for the appellants. Over and above, facts remain that out of 110 acres and 21 gunthas, only 30 acres and 35 gunthas have been resumed back by the Collector which was vested in the Panchayat. As per the facts established from the record, admittedly, gauchar land has not been allotted to the landless labourers whose land has been acquired in Dharoi Irrigation Project and admittedly it is a public purpose and for that, they have already lost their land since last many years and the land which has been allotted to them is not being given though specific order has been passed and though agreement to that effect has been entered into and practically they are landless people and only meagre portion of the land has been resumed by the Government for public purpose. I do not find any illegality in the concurrent judgments and decrees rendered by both the Courts so as to warrant interference by this Court and, hence, this Second Appeal is required to be rejected.

16. This Second Appeal is hereby rejected.

17. In view of the above order of rejection passed in Second Appeal, interim relief, if any, granted earlier stands vacated.

(R.P.DHOLAKIA,J.)

Further Order

After pronouncement of the aforesaid judgment,

learned advocate for the appellants, Mr.N.K.Majmudar, requests for stay in order to approach the higher forum. Having regard to the above facts and circumstances of the case, said request is rejected.

(R.P.DHOLAKIA,J.)

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